Rec'd 4/4/02

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

CV-F-02-5402 AWI DLB

AIR CONDITIONING TRADES ASSOCIATION UNILATERAL APPRENTICESHIP PROGRAM, an employee benefit plan, on behalf of itself, its apprentice plan participants and its employer contractor members, Plaintiff, vs. STEPHEN J. SMITH, in his official capacity as the Director of Industrial Relations and Administrator of Apprenticeship for the State of California and HENRY P. NUNN, in his official capacity as the Chief of the Division of Apprenticeship Standards of the Department of Industrial Relations of the State of California, Defendants	Case No.: **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** **42 U.S.C. §1983 et seq.**

Comes now Plaintiff AIR CONDITIONING TRADES ASSOCIATION UNILATERAL APPRENTICESHIP PROGRAM, an employee benefit plan, on behalf of itself, its apprentice plan participants and its employer contractor members and hereby alleges as follows:

JURISDICTION AND VENUE

1. Plaintiff brings this complaint on its own behalf and on behalf of its member employers pursuant to 42 U.S.C. §1983 to enjoin the actions of California state officials acting under color of state law from implementing regulations in conflict with the Federal Apprenticeship Act. also know as the Fitzgerald Act, 29 U.S.C. §50 until and unless these state officials follow the federal apprenticeship regulations, 29 C.F.R. §29 as required by the Supremacy Clause of the United States Constitution.

2. Venue is proper in the Fresno District of the United States District Court for the Eastern District of California because Plaintiff's apprenticeship program standards operate and are approved to operate in Merced, Stanislaus, Mariposa and Tuolomne counties of the State of California, the actions complained of herein arise out of the operations of those standards, and the enforcement and conduct complained of herein occurred and are within the venue and jurisdiction of this Court.

PARTIES

3. Plaintiff AIR CONDITIONING TRADES ASSOCIATION UNILATERAL APPRENTICESHIP PROGRAM (hereinafter referred to as ACTA) is an employee benefit plan as that term is defined by the Employee Retirement Income Security Act, 29 U.S.C. §1001 et seq, which exists for the purpose of providing apprenticeship and other craft training in the field of Heating, Ventilating, Air Conditioning and Sheet Metal Construction pursuant to standards approved by the State of California's Division of Apprenticeship Standards of the Department of Industrial Relations, acting as agents for the federal Office of Apprenticeship Training, Employer and Labor Services ("OATELS"), formally known as and referred to herein as the

Bureau of Apprenticeship and Training ("BAT"). Plaintiff ACTA is a unilateral or non-union apprenticeship program and brings this action on behalf of itself, its apprentice plan participants and its employer contractor members who all must abide by the ACTA Apprenticeship Standards as described hereinafter. Plaintiff ACTA has both direct and associational standing to bring this action because the actions of Defendants herein directly and proximately interfere with Plaintiff's ability to successfully operate for federal purposes a state approved apprenticeship program, ACTA's primary purpose for existing. Unless Defendants are enjoined from implementing certain regulations described hereinafter, ACTA's member contractors and apprenticeship plan participants (the apprentices) will be unable to participate in the ACTA apprenticeship program according to standards approved for federal purposes by the Division of Apprenticeship Standards and the California Apprenticeship Council.

4. Defendant STEPHEN J. SMITH is the Director of Industrial Relations (hereinafter referred to as the DIR) and Administrator of Apprenticeship for the State of California and is sued herein in his official capacity only.

5. Defendant HENRY P. NUNN, is the Chief of the Division of Apprenticeship Standards of the Department of Industrial Relations of the State of California (hereinafter referred to a the "DAS") and is sued herein in his official capacity only.

6. The California Apprenticeship Council (hereinafter referred to as the "CAC") is a state apprenticeship council as that term is defined by 29 C.F.R. §29.2(o) and California Labor Code Section 3070.

FACTS

7. Federal regulation of apprenticeship constitutes "a detailed regulatory scheme defining apprenticeship programs and their requirements, and establish[ing] a review, approval, and registration process for proposed apprenticeship programs administered by State Apprenticeship Councils under the aegis of the United States Department of Labor. . . ." (***Siuslaw Concrete Const. v. Wash., Dept. of Transp.*** 784 F.2d 952, 956 (9th Cir. 1986).

8. 29 C.F.R. § 29.1(b) states that : "The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, of acceptable apprenticeship programs with the U.S. Department of Labor. . . ." The regulatory scheme specifically includes provisions for federally approved state agencies, to "determine whether an apprenticeship program conforms ***with the Secretary's published standards*** and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary." (29 C.F.R. § 29.12(a) (emphasis supplied)).

9. The California Apprenticeship Council is a state apprenticeship council (hereinafter referred to as a "SAC") and agent for the federal BAT pursuant to 29 C.F.R. §29.12. The DIR, the DAS and the Administrator or Apprenticeship are each, singularly and jointly, responsible for implementing and enforcing the rules and regulations concerning apprenticeship enacted by the BAT and the CAC in the administration of all apprenticeship programs operating within the state of California recognized for federal purposes, including Plaintiff ACTA herein. The CAC regulations are published at Chapter 2 of Title 8 of the California Code of Regulations, section 200 through 282 inclusive.

10. By agreeing to be recognized as a SAC, the DAS, DIR and CAC each agreed to be bound by the rules and regulations of the BAT as set forth in 29 C.F.R. §§29 and 30, as well as any and

all lawful interpretations and implementations of such rules and regulations by the United States Department of Labor, Employment Training Administration, OATELS and/or BAT.

11. Plaintiff ACTA is a unilateral apprenticeship committee pursuant to Section 29.3(i) of title 29 of the Code of Federal Regulations, which states: "Where the employees to be trained have no collective bargaining agent, an apprenticeship program may be proposed for registration by an employer or group of employers."

12. Attached and marked as exhibit A hereto is the December 15, 1987 Circular 88-5 of the United States Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training which states that pursuant to 29 C.F.R. §29.12, "State Apprenticeship Councils/Agencies are expressly prohibited form unilaterally adopting policies and operating procedures which depart from, or impose requirements in addition to, those which meet the requirements of Title 29 C.F.R. Part 29. Approval of augmented polices and operating procedures are subject to BAT's discretion."

13. BAT regulations require that apprenticeship programs mandate subscribing employer pay apprentices an increasing percentage of journey level scale as they advance through the program, beginning with a wage rate not less than the minimum wages generally mandated by law. As stated in 29 C.F.R. §29.5(b)(5), the program must provide "A progressively increasing schedule of wages to be paid the apprentice consistent with the skill acquired. The entry wage shall be not less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable Federal law, State law, respective regulations, or by collective bargaining agreement."

14. In the case of association or union sponsored multiple employer programs, the level from which apprentice percentages on private works projects is measured is the average private works

journeyman scale of all the employees of all the employers included within the program, and the level for journey level wages on public works has been the prevailing wages as determined by the Director of Industrial Relations.

15. The federal regulations further do not provide for third party comment on any proposed change and/or application for a new program, except in the case of an employer or employer association which is party to a collective bargaining agreement, and in those cases, comment within 30 to sixty days only by the union that represents the employees of those employers. 29 C.F.R. §29.3 (h) and 29.12(b)(10).

16. 29 C.F.R. §29.3(h) states:

> Under a program proposed for registration by an employer or employers' association, where the standards, collective bargaining agreement or other instrument, provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgement of union agreement or no objection to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to the union, if any, which is the collective bargaining agent of the employees to be trained, a copy of its application for registration and of the apprenticeship program. The registration agency shall provide a reasonable time period of not less than 30 days nor more than 60 days for receipt of union comments, if any, before final action on the application for registration and/or approval.

17. Prior to September 6, 1995, state regulation of apprentice wages conformed to federal regulations by mimicking almost word for word the federal regulations. A copy of Title 8 of the California Code of Regulations operative before dated May 22, 1992 is hereto attached as exhibit B.

18. On or about September 6, 1995; operative 10-6-95 and published in Register 95, No. 36, the State of California amended Section 208 of title 8 of its rules and regulations to include a

"super minimum wage" on private works for entry level apprentices. A copy of the September 6, 1995 version of Title 8 Sections 200 et seq is attached hereto as Exhibit C.

19. Many ACTA apprentices work in the central valley where the market rate for entry level sheetmetal workers is the federal minimum wage. A contractor would use a non-indentured helper on private work if the contractor could avoid the increased costs of a super minimum wage set forth in the new regulations. On the other hand, a contractor would not be able to bid competitively with non-union, non-participating contractors for private work projects upon which to employ its apprentices because of the super minimum wages mandated in the new apprenticeship regulations Thus, by increasing the entry level wages of apprentices on private works, Plaintiffs ACTA's apprentices were disadvantaged in obtaining work and training opportunities on private work projects.

20. On or about January 17, 2002 the CAC adopted a set of new regulations including drastic changes to the entry level and progressive wage scales required to be paid apprentices working on private works, a copy of which is attached hereto as exhibit D.

21. Amendment of section and Note was filed 1-17-2002; and is to be operative on 2-16-2002 according to Register 2002, No. 3.

22. These regulations require Plaintiff ACTA to dramatically change its mandated wage scales for apprentices on private works, which has already had the impact of denying apprentices the opportunity to work on such projects. Worse, the regulations require the employer member contractor to use apprentices on such work, thereby forcing the employer member contractors to abandon the program all together in order to remain competitive in the private sector.

23. In addition, the January 16, 2002 regulations now provides, for the first time, at Section 212.2 that "A revision to change the program's occupation or to change the program's geographic area of operation to include a different labor market area subject to the same application and approval process set out in (a)-(j) of this section for approval of a program, including providing notice of the proposed revision and an opportunity for comment to existing programs in the same apprenticeable occupation in the labor market area."

24. Section g of 8 C.C.R. 212.2 provides that the geographic expansion must be first submitted to third parties, i.e. union JAC's in the proposed operating area and that the program expansion shall not be approved unless there is a demonstrated need for the program. Such submission delays, and even denies, program expansion simply to preserve existing anti-competitive monopolies on education and training.

25. All apprenticeship programs are private educational institutions and the state has no compelling interest in establishing restriction to access to the fundamental right to education by imposing anti-competitive requirements for program operations.

26. The California Supreme Court has previously invalidated this very same "need" requirement as being inconsistent with the National (Fitzgerald) Act in the case of ***Southern Cal. Chapter of Associated Builders and Contractors, Inc., Joint Apprenticeship Committee v. California Apprenticeship Council***, 4 Cal. 4th 422, 434, (Cal. 1992) cited with approval by the United States Supreme Court in ***California Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.***, 519 U.S. 316 (1997). As the California Supreme Court stated in So. Cal. ABC:

> Second, we observe that the only apparent purpose of the challenged requirement in section 212.2(a) is to restrict competition among apprenticeship programs, as it was interpreted by the Council to do in this case. The legislative history of the Fitzgerald Act and the regulations promulgated thereunder, however, do not demonstrate a Congressional

intent to restrict competition in this area or to prefer existing training programs over new programs.

27. These anti-competitive requirements of apprentice plan operations interfere with the purpose of the National Apprenticeship Act, which is to provide uniform national standards for excellence in apprentices programs and violates the Privileges and Immunities and the Equal Protection clauses of the United States and California Constitutions by interfering with the fundamental right to obtain a private education and to engage in a lawful profession.

28. Neither the CAC nor Respondents have submitted the 1995 and/or the 2002 revision of 8 C.C.R. Sections 208 and 212.2 to the BAT as required by circular 88-5.

29. On or about February 15, 2002, Assistant Secretary for Employment and Training of the OATELS of the United States Department of Labor wrote to Respondent Smith, as Administrator of Apprenticeship, expressing concern that the new regulations would adversely impact apprenticeship training opportunities for non-union contractors, a copy of which letter is hereto attached as exhibit E

30. On or about March 1, 2002, Respondent Smith replied, a copy of which is attached hereto as exhibit F.

31. 8 C.C.R. §212.2(j) mandates a one and one half year waiting period before any program expansion and/or a new program can be approved by Defendants herein.

32. Defendant Nunn has refused to approve Plaintiff ACTA's repeated requests for statewide expansion without explanation

33. Defendant Nunn has ordered ACTA member contractors to cease paying ERISA trust fund contributions for apprentices and cease training and employing apprentices in certain counties while allowing them to continue to train, recruit, employ and accept contributions for apprentices in other counties of the State of California.

34. Defendant Nunn has ordered three other unilateral (non-union) apprenticeship programs (the Plumbing Heating Cooling Contractors of California), the Independent Roofing Contractors of California and the Western Electrical Contractors Association) to not accept for apprenticeship training (indenture) applicants based upon their residency, to not recruit, train, employ or accept ERISA trust fund contributions for apprentices in certain counties of the State of California while allowing such conduct in other counties, based solely upon the county of residence and/or training and/or work without any compelling state reason.

35. Unless enjoined by this Court, Defendants, and each of them, will continue to demand Plaintiff modify its standards to reflect the wage scales of the new section 208 of 8 C.C.R.

36. Unless enjoined by this Court, Defendants, and each of them, will continue to deny Plaintiff ACTA statewide expansion for failure to consult and obtain the approval of existing programs pursuant to Section 212.2 of 8 C.C.R.

37. 29 C.F.R. §29.11(e) does not require exhaustion of administrative remedies to the extent there are any administrative remedies available to Plaintiffs herein, or in the alternative, exhaustion would be futile as the regulations are being challenged directly.

FIRST CAUSE OF ACTION:
FAILURE TO OBTAIN BAT APPROVAL BEFORE IMPLEMENTATION

38. Plaintiffs incorporate by reference all facts set forth above as if fully set forth herein.

39. Because California has a federally recognized State Apprenticeship Council, the CAC is the exclusive agency for obtaining apprenticeship approval for federal purposes in California.

40. As stated by federal Circular 88-5, federal regulations require that all changes in regulations that impact the ability of existing or new apprenticeship programs to operate successfully must be approved before implementation by the BAT.

41. The aforementioned regulations at Title 8 C.C.R. §§ 208 and 212.2 impact adversely the ability of existing or new apprenticeship programs to operate successfully.

42. Upon information and belief, Defendants have never submitted for BAT approval the aforementioned regulations at Title 8 C.C.R. §§ 208 and 212.2.

43. Whether the regulations were submitted or not, BAT has not approved the aforementioned regulations at Title 8 C.C.R. §§ 208 and 212.2.

44. Defendants are implementing and enforcing the aforementioned regulations at Title 8 C.C.R. §§ 208 and 212.2.

45. Unless enjoined by this court, Defendants will continue to implement and enforce the aforementioned regulations at Title 8 C.C.R. §§ 208 and 212.2, even without BAT approval.

46. Therefore, Plaintiff seeks to enjoin Defendants, and each of them, from implementing and enforcing the aforementioned regulations at Title 8 C.C.R. §§ 208 and 212.2 until such time as those regulations have been approved by BAT.

SECOND CAUSE OF ACTION: RESTRICTIONS ON NEW OR EXPANDED PROGRAMS BASED ON CONSULTATION WITH EXISTING PROGRAMS

47. Plaintiffs incorporate by reference all facts set forth above as if fully set forth herein.

48. 8 C.C.R. §212.2(a) requires "consultation" with existing (union) programs before Defendant can approve new non-union programs, or approve the expansion of already existing non-union programs even though no union represents the employees of the employers signatory to the new and/or expanding program. "A revision to change the program's occupation or to change the program's geographic area of operation to include a different labor market area is subject to the same application and approval process set out in (a)-(j) of this section for approval of a program, including providing notice of the proposed revision and an opportunity for comment to existing programs in the same apprenticeable occupation in the labor market area."

49. For no rational reason and without any corresponding federal regulation, 8.C.C.R. §212.2(j) provides a minimum waiting period of one and one half year for approval of any new program or program expansion, stating: "The median time for processing an application to train apprentices, from the receipt of the initial application to the final approval decision, based on the experience in the two years preceding the proposal of this Section, is two years. The minimum time is one and a half years, and the maximum time is three years."

50. In addition, 8 C.C.R.§212.2 affords the existing program, as an "interested party" the right to file an appeal of any program approval. Because Defendants will not accept apprentices into a program under appeal, or allow a program to operate during the appeal, the existing joint (union) programs are able to delay the new operation or the expansion of a unilateral (non-union) program almost indefinitely.

51. 29 C.F.R. §29.3 (h) and 29.12(b)(10) limit the requirement that new programs consult with a union to situations where the employees of that program are represented by the that union only. "BAT acknowledged that '[§] 29.3(h) is only applicable to the situation where an employer seeks to register a new apprenticeship program.'" ***Associated Builders and Contractors, Inc. v. Herman***, 166 F.3d 1248, 1256 (D.C. Cir. 1999).

52. As stated by the United States Court of Appeals for the District of Columbia Circuit in the case of ***Road Sprinkler Fitters Local Union 669 v. Herman*** 234 F.3d 1316 (2000): "But the agency [BAT] sees the relationship between subsections (h) and (i) [of 29 C.F.R.§29.3] quite differently: when [29 C.F.R.§29.3] subsection (i) permits a unilateral employer program, [29 C.F.R.§29.3] subsection (h) need not be considered."

53. The purpose of the National Apprenticeship Act is to facilitate apprenticeship approval, not to delay it. The National Apprenticeship Act and the federal (BAT) regulations encourage

competition among apprenticeship programs to train more and more apprentices. The aforesaid CAC regulations are anti-competitive and serve no legitimate state purpose.

54. Unless enjoined and restrained, Defendants, and each of them, will continue to require consultation with existing joint (union) programs before approving any new unilateral (non-union) program, and any expansion of an existing unilateral (non-union) program, will continue to impose a minimum waiting period of one and one half years for program approval, thus denying the fundamental rights to education and work opportunity without a compelling state interest, and will continue to allow existing joint (union) program to delay the operations of new or expansion of existing programs by filing appeals with the CAC.

55. Therefore, Plaintiff seeks to enjoin Defendants, and each of them, from implementing and enforcing the aforementioned regulations at Title 8 C.C.R. §212.2 insofar as it requires consultation with existing union programs as a pre-requisite for approval of new or expansion of unilateral (non-union) programs, that it mandates any delay and that it allows existing programs standing to delay the implementation of any program pending appeal.

Wherefore, Plaintiff prays this Court issue an order to Defendants, and each of them, and their agents, successors, and assigns:

1. enjoining and restraining them from implementing and enforcing the aforementioned regulations at Title 8 C.C.R. §§ 208 and 212.2 until such time as those regulations have been approved by federal Bureau of Apprenticeship and Training, and/ or

2. enjoining and restraining them from implementing and enforcing the aforementioned regulations at Title 8 C.C.R. § 212.2 in so far as it requires consultation with existing joint (union) programs as a pre-requisite for approval of new or expansion of unilateral (non-

union) programs, that it mandates any delay and that it allows existing programs standing to delay the implementation of any program pending appeal,

3. declaring that the 1995 and 2002 revision to 8 C.C.R §208 and the 2002 amendments to 8 C.C.R. §212.2 are void and unenforceable,

4. awarding Plaintiff attorneys fees and costs, and

5. granting such other relief as the Court deems just.

Dated this 10th day of April, 2002

Thierman Law Firm

By: _____

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